

**No. 18-5298**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WOODHULL FREEDOM FOUNDATION, HUMAN RIGHTS WATCH,  
ERIC KOSZYK, JESSE MALEY a/k/a ALEX ANDREWS and  
THE INTERNET ARCHIVE,

*Appellants,*

*v.*

THE UNITED STATES OF AMERICA AND WILLIAM BARR,  
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED  
STATES,  
*Appellees.*

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From an Order by the U.S. District Court for the District of Columbia  
The Honorable Richard J. Leon, Judge Presiding (Case No. 1:18-cv-1552-RJL)

**BRIEF OF THE STATES OF TEXAS, ALABAMA, ARKANSAS,  
FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY,  
LOUISIANA, MASSACHUSETTS, MINNESOTA, MISSISSIPPI,  
MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA,  
SOUTH DAKOTA, UTAH, VIRGINIA, AND WEST VIRGINIA,  
AS AMICI CURIAE, IN SUPPORT OF APPELLEES**

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KEN PAXTON  
Attorney General of Texas

JEFFREY C. MATEER  
First Assistant Attorney General

KYLE D. HAWKINS  
Solicitor General

KAREN L. WATKINS  
Assistant Attorney General  
Texas Bar No. 20927425  
OFFICE OF THE ATTORNEY GENERAL  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4208  
Facsimile: (512) 320-0167  
karen.watkins@oag.texas.gov

*Counsel for Amici Curiae States*

[counsel for additional Amici listed at end of brief]

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## **Identity and Interest of Amici Curiae**

Amici are the States of Texas, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and West Virginia. The Amici States have a vital interest in combatting human trafficking and, in particular, sex trafficking. The Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (“FOSTA”), gives the States an additional means of preventing sex trafficking.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the States may file an amicus brief without consent or leave of court.<sup>1</sup>

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<sup>1</sup> Neither amici nor counsel received any monetary contributions intended to fund preparing or submitting this brief. No party’s counsel authored this brief in whole or in part.

## Introduction and Summary of the Argument

Under the guise of supporting the Appellants' standing position, the Amici supporting Appellants have framed this case solely as a free speech issue, describing the governmental interest as "slight or nonexistent." Brief of Amicus Institute for Free Speech at 2. Yet the congressional intent, apparent from FOSTA's language, was to target *unprotected* speech that promotes or facilitates the trafficking of human beings to be exploited in unlawful commercial sex trade. The Amici States have the greatest possible interest in battling this pernicious and illegal activity: protection of the health, safety, and welfare of their citizens by seeking to end sex trafficking. FOSTA is a valuable tool in enabling the Amici States to achieve that goal.

The Amici States file this Brief to correct this imbalance by providing the Court information about the ongoing human-trafficking crisis and the efforts they have made in their respective jurisdictions to prevent citizens from becoming victims of sex traffickers and to prevent other victims from being marketed to their citizens as commercial-sex-services providers via the internet. The Court should affirm the judgment of the district court.

## Argument

### I. Human trafficking – especially sex trafficking – is a rapidly growing problem in the United States.

As shown by the experience of the Amici States, there is simply no way to overstate the magnitude of the human-trafficking problem, either in terms of prevalence or the severity of the injuries inflicted on the victims. The United States Department of Homeland Security defines "[h]uman trafficking [a]s modern-day slavery" that

“involves the use of force, fraud, or coercion to obtain some type of labor or commercial sex act.” U.S. DEP’T OF HOMELAND SECURITY, *What is Human Trafficking?*, <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Apr. 10, 2019). The Department has also concluded that human trafficking is “second only to drug trafficking as the most profitable form of transnational crime.” *Id.*

In its most recent *Global Report on Trafficking in Persons*, the United Nations Office on Drugs and Crime noted that “79 per cent of all detected trafficking victims are women and children.” U.N.O.D.C., *Global Report on Trafficking in Persons 2016*, at 1, [http://www.traffickinginstitute.org/wp-content/uploads/2017/01/2016\\_Global\\_Report\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.traffickinginstitute.org/wp-content/uploads/2017/01/2016_Global_Report_on_Trafficking_in_Persons.pdf). Sexual exploitation and forced labor are the most prominent types of trafficking worldwide. *Id.* In North America, most trafficking victims are women (60%), and the most prevalent type of trafficking is sex trafficking (55%). *Id.* at 89.

The National Human Trafficking Hotline, a non-profit anti-trafficking hotline and resource center, compiles statistics based on information gleaned from telephone calls, emails, and online tips made to that entity. *Hotline Statistics*, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> (last viewed Apr. 17, 2019). The Hotline keeps track of the number of trafficking cases that are opened based on calls made to the Hotline, breaking that number down by state and the type of trafficking involved. *Id.* In 2012, the Hotline noted that 3,272 cases were initiated based on calls to the Hotline; by 2017, the last complete year for which

statistics are available, the number had risen to 8,524. Of those 8,524 cases, 6,081 – over 71% – involved sex trafficking.<sup>2</sup>

The Hotline’s state statistics for the first six months of 2018 reflect similar percentages of sex-trafficking cases for the Amici States. For example, of the human-trafficking cases initiated through the Hotline, for that period, 70% of Kansas’ cases were sex-trafficking cases. *Id.* (search “Kansas”). For the same period, 65% of Mississippi’s human-trafficking cases were sex-trafficking cases. *Id.* (search “Mississippi”). Texas’ percentage of sex-trafficking cases during the first six months of 2018—71%—was consistent with the national percentage. *Id.* (search “Texas”).

Trafficking vulnerable women and children for sexual purposes has proven to be profitable for traffickers, who have become ever more skilled in attracting and selling their victims. Those who are combatting sex trafficking, like the Amici States, need the assistance of tools like FOSTA to put an end to trafficking.

## **II. The Amici States are all dedicated to combatting sex trafficking.**

The Amici States have all demonstrated their commitment to combatting human trafficking. The following examples of their work are illustrative. In Texas, one of Attorney General Ken Paxton’s first major initiatives was to form the Human Trafficking and Transnational/Organized Crime Section within his office. *Human Traf-*

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<sup>2</sup> Because the Hotline’s statistics do not include cases that originated from calls to law enforcement or other governmental entities, their numbers do not represent all of the trafficking that is actually occurring or all of the cases the Amici States have initiated to combat it.

ficking, ATTORNEY GENERAL OF TEXAS, <https://www.texasattorneygeneral.gov/initiatives/human-trafficking> (last viewed Apr. 11, 2019). The charge of the Human Trafficking Section is two-fold: to prosecute traffickers and to educate the public to be the eyes and ears that spot warning signs of trafficking. Ken Paxton, *Human trafficking is on the defensive in Texas*, CORPUS CHRISTI CALLER-TIMES, Sept. 17, 2018, <https://www.caller.com/story/opinion/2018/09/17/human-trafficking-defensive-texas/1337495002>. The Section has developed a powerful citizen-training video designed to mobilize all Texans to “Be the One,” to see and report indicators of human trafficking. Videotape: Be The One in the Fight Against Human Trafficking; <https://www.texasattorneygeneral.gov/initiatives/human-trafficking> (accessible from page).

Most recently, the Section’s prosecutors obtained the conviction of a man who forced two young women into sex trafficking after having contacted the youngest of them on-line. The man was sentenced to 55 years in prison. *AG Paxton’s Office Obtains Conviction, 55-Year Prison Sentence in Sex Trafficking Case Involving Underage and Adult Victims*, ATTORNEY GENERAL OF TEXAS, Dec. 6, 2018, <https://www.texasattorneygeneral.gov/news/releases/ag-paxtons-office-obtains-conviction-55-year-prison-sentence-sex-trafficking-case-involving-underage>.

In Georgia, Attorney General Chris Carr worked with the Georgia Bureau of Investigation and Atlanta-based non-profit Street Grace to launch a nationwide initiative in January of 2018 called *Demand an End*. *Attorney General Carr, GBI and*

*Street Grace Launch “Demand An End” Campaign, Target Buyers in Domestic Minor Sex Trafficking*, <https://law.georgia.gov/press-releases/2018-01-11/attorney-general-carr-gbi-and-street-grace-launch-%E2%80%9Cdemand-end%E2%80%9D-campaign-0> (last visited April 17, 2019). A comprehensive campaign available to all 50 states, *Demand an End* shares information and legislative strategies and implements best practices across the country to address demand for sex trafficking. Demand an End – Street Grace, <https://www.streetgrace.org/demand-an-end/> (last visited April 19, 2019). General Carr serves as the national ambassador for “*Demand An End*,” and at this time, 11 states have joined the campaign. *See States – Demand an End*, <https://www.streetgrace.org/states-demand-an-end/> (last visited April 17, 2019). In addition, General Carr has successfully advocated for strengthening Georgia laws that target sex trafficking by, among other things, increasing penalties for trafficking of individuals for sexual servitude and including human trafficking in a statutory list of gang-related crimes to enhance law enforcement’s ability to address sex trafficking in the gang context. *See* 2018 Ga. Laws Act 422 (H.B. 732); HB 424 2019-2020 Regular Session, Georgia General Assembly, <http://www.legis.ga.gov/Legislation/en-US/display/20192020/HB/424> (last visited April 19, 2019).

Kansas Attorney General Derek Schmidt’s office coordinates and chairs the Kansas Human Trafficking Advisory Board, a group comprised of law enforcement personnel, prosecutors, court personnel, advocates, survivors of human trafficking, and others with expertise in the field. *Human Trafficking Advisory Board*, OFFICE

OF THE ATTORNEY GENERAL OF KANSAS, <https://ag.ks.gov/about-the-office/advisory-groups/human-trafficking-advisory-board> (last viewed Apr. 17, 2019).

In July 2018, Schmidt's office joined the “*Demand an End*” public awareness initiative, inviting Kansans to sign a petition that was presented to the Kansas legislature and governor, demanding an end to commercial sexual exploitation. *AG Derek Schmidt: More than 3,500 Kansans demand an end to the sexual exploitation of human beings*, OFFICE OF THE ATTORNEY GENERAL OF KANSAS, <https://ag.ks.gov/media-center/news-releases/2019/02/15/ag-derek-schmidt-more-than-3-500-kansans-demand-an-end-to-the-sexual-exploitation-of-human-beings> (last viewed Apr. 11, 2019). Also in 2018, Kansas became the first state in the country to require all classes of Commercial Driver’s License (CDL) holders to take basic human-trafficking awareness training. *Human trafficking awareness training approved for CDL holders*, OFFICE OF THE ATTORNEY GENERAL OF KANSAS, <https://ag.ks.gov/media-center/news-releases/2018/04/03/human-trafficking-awareness-training-approved-for-cdl-holders>.

In addition, the Office of the Kansas Attorney General has trained more than 5,000 law enforcement officers across the State as part of its statutory mission to coordinate human-trafficking training for law enforcement agencies throughout Kansas. See K.S.A. 2018 Supp. 75-76.

In Massachusetts, the Attorney General’s Office created a Human Trafficking unit in 2012, later expanded to a Human Trafficking Division by Attorney General Maura Healey in 2015, which is devoted to “prosecuting and preventing human traf-

ficking through law enforcement efforts and policy development.” *Human Trafficking Division, OFFICE OF ATTORNEY GENERAL MAURA HEALEY*, <http://www.mass.gov/ago/bureaus/criminal/human-trafficking-division/> (last viewed Apr. 16, 2019). Massachusetts’ Human Trafficking Division carries out a broad range of initiatives to combat trafficking, including partnering with local law enforcement to charge sex buyers, partnering with businesses to create zero-tolerance workplace policies on sex buying, and working to improve access to services for those who have been prostituted or trafficked. *See id.* (collecting information and links regarding these initiatives and additional resources).

During fiscal years 2017 and 2018, the Mississippi Attorney General’s Office trained nearly 2,000 individuals, from law enforcement officers to medical personnel, to identify and respond to indicators of human trafficking. *See 2017 Annual Report of Attorney General Jim Hood, OFFICE OF THE ATTORNEY GENERAL, STATE OF MISSISSIPPI*, at 8, available at [http://www.ago.state.ms.us/wp-content/uploads/2017/12/Annual-Report-FY2017\\_FINAL.pdf](http://www.ago.state.ms.us/wp-content/uploads/2017/12/Annual-Report-FY2017_FINAL.pdf), and *2018 Annual Report: Fiscal Year 2018, OFFICE OF THE ATTORNEY GENERAL, STATE OF MISSISSIPPI*, at 31, available at [http://www.ago.state.ms.us/wp-content/uploads/2019/01/FY-2018-AGO-Annual-Report-FINAL\\_spreadsp.pdf](http://www.ago.state.ms.us/wp-content/uploads/2019/01/FY-2018-AGO-Annual-Report-FINAL_spreadsp.pdf). Mississippi Attorney General Jim Hood also partnered with Homeland Security to improve reporting of human-trafficking investigations and convened a working group of state agencies and non-governmental organizations to particularly target juvenile sex-trafficking cases. *2017 Annual Report of Attorney General Jim Hood, OFFICE OF THE ATTORNEY GENERAL*,

STATE OF MISSISSIPPI, at 21, *available at* [http://www.ago.state.ms.us/wp-content/uploads/2017/12/Annual-Report-FY2017\\_FINAL.pdf](http://www.ago.state.ms.us/wp-content/uploads/2017/12/Annual-Report-FY2017_FINAL.pdf).

Louisiana has made human trafficking prevention and eradication a priority. Its Department of Children and Family Services produces an annual report on human trafficking. *See, e.g.*, “Human Trafficking, Trafficking of Children for Sexual Purposes, and Commercial Sexual Exploitation, Annual Report,” (La. Dep’t of Children & Family Servs., Feb. 2019) *accessible at* <http://www.dcf.louisiana.gov/assets/docs/searchable/Child%20Welfare/PlansReports/Human%20Trafficking%20Report%202019.pdf>. In addition, Louisiana’s legislature created the Louisiana Human Trafficking and Prevention Commission and Advisory Board, which includes members from all three branches of government, as well as from agencies and non-governmental entities that are involved in combatting the problem of human trafficking and providing services to trafficking victims. One of the Commission’s goals is to increase coordination among public and private programs to strengthen prevention and intervention services. *See Executive Summary for the 2018 Annual Report, LOUISIANA HUMAN TRAFFICKING PREVENTION COMMISSION AND ADVISORY BOARD* (March 14, 2019), *available at* [http://www.lasc.org/documents/2018\\_HTPC\\_Exec\\_Summary\\_and\\_Annual\\_Report.pdf](http://www.lasc.org/documents/2018_HTPC_Exec_Summary_and_Annual_Report.pdf).

Ohio operates three regional human-trafficking task forces, which enable local, state, and federal agencies to share intelligence and conduct joint investigations throughout Ohio. Governor’s Ohio Human Trafficking Task Force Report, at 22 (January 2019), *available at* <https://www.humantrafficking.ohio.gov/OhioHuman-TraffickingTaskForceReport0119.pdf>.

As these examples show, the Amici States are dedicated to combatting human trafficking. In the face of its increasing prevalence, all of the tools available should be put to use.

### **III. FOSTA is a valuable tool in the Amici States’ fight against human trafficking.**

In the first substantive section of FOSTA, Congress observed that, while the Communications Decency Act of 1996 “was never intended to provide legal protection” to websites that unlawfully promote and facilitate prostitution or advertise the sale of unlawful sex acts with sex-trafficking victims, some websites that promoted and facilitated prostitution had “been reckless in allowing the sale of sex trafficking victims.” Allow States and Victims to Fight Online Sex Trafficking Act, Pub. Law 115-164, § 2, April 11, 2018, 132 Stat. 1253. FOSTA was designed to correct that situation.

FOSTA makes explicit that: (1) federal law no longer can be said to provide legal protection for websites that unlawfully facilitate sex trafficking; and (2) States may now pursue state-law prosecutions based on conduct that would also violate FOSTA. 47 U.S.C. § 230(e)(5). Consequently, if a State criminalizes the same conduct FOSTA criminalizes, the State need not wait for the Department of Justice to prosecute traffickers operating in the State; the State’s prosecutors may do so themselves.<sup>3</sup> FOSTA also authorizes a state attorney general, on behalf of the residents

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<sup>3</sup> Bills to accomplish this are currently pending before the Texas Legislature. Tex. H.B. 15, 86th Leg., R.S. (2019) and Tex. S.B. 20, 86th Leg., R.S. (2019). <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=HB15> and <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB20>.

of his or her State, to initiate civil actions against those who violate 18 U.S.C. § 1591 (“Sex trafficking of children or by force, fraud, or coercion”) if there is “reason to believe” that an interest of the State’s residents has been or is threatened or adversely affected by the violators. 18 U.S.C. § 1595(d).

With the aid of the internet, sex trafficking is becoming more profitable and, therefore, more prevalent. FOSTA and consistent state statutes give the Amici States more tools to prevent traffickers from victimizing those they meet online and from advertising those victims online as commercial sex providers.

\* \* \*

FOSTA is a crucial statute in the fight against the scourge of sex-trafficking. Appellants’ efforts to have FOSTA invalidated would remove from the States a crucial tool in the battle to end modern-day slavery and bring its purveyors to justice.

### **Conclusion**

The Court should affirm the judgment of the district court.

Respectfully submitted,

STEVE MARSHALL  
Attorney General of Alabama

KEN PAXTON  
Attorney General of Texas

LESLIE RUTLEDGE  
Attorney General of Arkansas

JEFFREY C. MATEER  
First Assistant Attorney General

ASHLEY MOODY  
Attorney General of Florida

KYLE D. HAWKINS  
Solicitor General

CHRIS CARR  
Attorney General of Georgia

*/s/ Karen L. Watkins*

KAREN L. WATKINS  
Assistant Attorney General  
Texas Bar No. 20927425  
OFFICE OF THE ATTORNEY GENERAL  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4208  
Facsimile: (512) 320-0167  
karen.watkins@oag.texas.gov

CURTIS T. HILL, JR.  
Attorney General of Indiana

DEREK SCHMIDT  
Attorney General of Kansas

ANDY BESHEAR  
Attorney General of Kentucky

JEFF LANDRY  
Attorney General of Louisiana

MAURA HEALEY  
Attorney General of Massachusetts

KEITH ELLISON  
Attorney General of Minnesota

JIM HOOD  
Attorney General of Mississippi

**TIMOTHY C. FOX**  
Attorney General of Montana

**DAVE YOST**  
Attorney General of Ohio

**MIKE HUNTER**  
Attorney General of Oklahoma

**ALAN WILSON**  
Attorney General of South Carolina

**JASON RAVNSBORG**  
Attorney General of South Dakota

**SEAN D. REYES**  
Attorney General of Utah

**MARK R. HERRING**  
Attorney General of Virginia

**PATRICK MORRISEY**  
Attorney General of West Virginia

*Counsel for Amici Curiae States*

**Certificate of Service**

On April 22, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

*/s/ Karen L. Watkins*  
KAREN L. WATKINS

**Certificate of Compliance**

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,268 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

*/s/ Karen L. Watkins*  
KAREN L. WATKINS